IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN
AT JODHPUR.

JUDGMENT

Polar Marmo Agglomarates Ltd.
vs.
Nathu Lal and others.

S.B. CIVIL FIRST APPEAL NO.46/1998
AGAINST THE JUDGMENT/ORDER DATED
24.1.1998 PASSED BY ADDITIONAL
DISTRICT JUDGE NO.2, UDAIPUR
IN CIVIL CASE NO.11/1990.

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Date of Judgment : 25.1.2005

HON'BLE MR. PRAKASH TATIA, J.

Mr. M.L. Garg, for the appellant.
Mr. B.N. Kalla, for the respondent no.1
Mr. N.M. Lodha, for the respondent no.3.

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Heard learned counsel for the parties.

This appeal is directed against the judgment/order dated 24.1.1998 passed by the Additional District Judge No.2, Udaipur in Civil Case No.11/1990 by which the court below dismissed the application filed by the appellant under Order 21 Rule 58 C.P.C. after holding

that the property in question was attached on 12.12.1988, therefore, respondent Rajasthan Financial Corporation (for short 'RFC') could not have taken possession of the property in the year 1989 i.e. on 24.1.1989 and consequently, could not have transferred the property to the appellant.

According to learned counsel for the appellant, the court below has committed serious error of fact as well as law because of the fact that the court below has not decided the objection petition of the appellant in accordance with law, rather, the court below has not even decided the points raised by the appellant in his objection petition and decided the same only on the ground that RFC could not have taken possession of the property whereas the court below is required to decide the right, title and interest in the property in question with respect to the claim set up by the parties in the proceedings under Order 21 Rule 58 C.P.C. It is also submitted that even the suit for establishing the right, title and interest in the property under attachment is barred in view of sub-rule 2 of Rule 58 of Order 21 C.P.C.

Learned counsel for the respondent Nathu Lal submits that the property was attached on 12.12.1988 which is clear from the copy of attachment warrant placed on record as Annex.A/1 which clearly reveals that the property was attached before the possession

of the property was taken by RFC and given to the appellant.

I have considered the submissions of the learned counsel for the parties and have perused the record.

It is clear from the facts of the case that the appellant came out with a case that the suit property was mortgaged with RFC by respondent no.2 in the year 1968 for which mortgage deed was executed on 28.2.1968 and 14.10.1969. Even if the claim of respondent Nathu Lal is accepted, then he only obtained money decree and obtained attachment order for the property in question and even if it is accepted that the property was in fact, attached on 12.12.1988, then also, the court below was under an obligation to determine the right, title and interest in the property of the parties and on finding that the property was subjected to mortgage, could have passed appropriate order to proceed with execution but attachment could have been continued only subject to mortgage which is prior in time.

A bare perusal of the entire order passed by the executing court clearly reveals that the executing court even has not framed the issues as required. The executing court proceeded only on the basis that if the property was attached, then the property neither could have been sold by RFC nor could have been

purchased by the appellant. While doing so, the executing court did not examine the effect of Section 29 of the State Financial Corporation Act. It is also clear from the order that the effect of mortgage has not been considered by the executing court. Not only this, whether the property is charged or not, has not been considered.

In view of the above, the order of the executing court deserves to be set aside, hence, set aside.

In the light of the pleadings of the parties, following issues are required to be framed :-

(i) Whether the property in question was mortgaged with R.F.C. by the respondent no.2/non-claimant no.2 on 28.2.1968 and 14.10.1969 ?

(ii) Whether the R.F.C. Could have taken possession of the property in dispute by exercising powers under Section 29 of the S.F.C. Act ?

(iii) Whether the transfer of the property in question in favour of the appellant by R.F.C. after due publication of public notice can be recognized despite the fact that the property was already attached by the executing court ?

(iv) Whether the property in question was duly attached by the executing court or not ?

(v) If the Court finds that the property was already mortgaged and attachment order was issued subsequently, then what course can be adopted in the execution petition for recovery of money of

decree holder – respondent Nathu Lal ?

In view of the above, this appeal is allowed, the order of the executing court is set aside and the matter is remanded to the executing court. The parties are directed to appear before the Court on 15.2.2005. The executing court shall decide the objection petition afresh after giving opportunity to both the parties to produce and lead evidence. The matter may be decided by the executing court within a period of three months as this case is very old one.

(PRAKASH TATIA), J.

S.Phophaliya